

**IN THE MATTER OF** the Ontario Energy Board Act, 1998, S.O.  
1998, c. 15, schedule B;

**AND IN THE MATTER OF** an application by Dufferin Wind  
Power Inc. for an Order granting leave to construct a new  
transmission line and associated facilities.

**APPLICANT REPLY SUBMISSIONS**

**ON FORM OF HEARING**

**February 25, 2013**

**A. INTRODUCTION**

1. In Procedural Order No. 2, the Board indicated that it would determine if an oral hearing is required after the completion of the interrogatory phase. Dufferin Wind Power Inc. ("DWPI" or the "Applicant") received interrogatory questions on January 4, 2013 from Board staff and four of the seven intervenors - Dufferin County, Conserve Our Rural Environment ("CORE"), Lori Bryenton and Harvey Lyon. DWPI filed its interrogatory responses on January 16, 2013. In Procedural Order No. 3, issued on February 5, 2013, the Board indicated that it would accept submissions from intervenors and Board staff with respect to whether the Board should proceed by way of an oral or written hearing. With the exception of CORE, no intervenor filed submissions in support of the view that the Board should proceed by way of an oral hearing. Board staff filed a letter indicating that it would not be filing submissions. The following are the Applicant's reply submissions with respect to this issue.

2. In DWPI's submission, the matter should continue to proceed by way of written hearing. For the following reasons, an oral hearing should not be required:
  - (a) DWPI has filed comprehensive materials in accordance with the filing requirements, as well as detailed responses to numerous interrogatories on all aspects of the Application, and no party has raised concerns as to the sufficiency of the Application relative to the filing requirements or as to the completeness of the interrogatory responses;
  - (b) Given the scope of the proceeding, as limited by Section 96 of the *Ontario Energy Board Act*, the Board does not require additional facts in order to reach a decision;
  - (c) Parties have had ample opportunity to ask questions and to request additional information on all relevant aspects of the Application and pre-filed evidence through the written interrogatory process;
  - (d) the issues identified in the submissions of CORE, to the extent they raise concerns that are relevant to the scope of the proceeding, raise matters that are appropriate for argument rather than for further evidence; and
  - (e) based on the foregoing, an oral hearing would be of insufficient probative value to warrant its conduct.
3. The evidence filed in this proceeding is extensive. DWPI filed a complete application on September 21, 2012 together with pre-filed evidence (the "Application"), all in accordance with the applicable requirements set out in Chapter 4 of the Board's *Minimum Filing Requirements for Transmission and Distribution Rate Applications and Leave to Construct Projects* (the "Filing Requirements"). DWPI filed additional information on October 10 and October 22, 2012 in response to requests from Board counsel. On November 23, 2012, the Applicant filed an update to address a minor change in the location of the Switching Station and to correct a minor error in certain mapping. On December 18, 2012, the Applicant filed information concerning its Renewable Energy Approval process in response to the Board's request in Procedural Order No. 2. On January 16, 2013, DWPI responded to nearly 70 interrogatories comprising over 140 separate questions and requests from Board staff and intervenors on all aspects of the pre-filed evidence. On February 15, 2013, DWPI provided additional information in response to the Board's request in Procedural Order No. 3 concerning its corporate organizational capabilities.

4. No party has raised any concerns with the completeness of the Application relative to the filing requirements or with the sufficiency of the Applicant's interrogatory responses or any other information filed. As such, in the Applicant's view, the factual record in the proceeding is complete.

## **B.WHY SHOULD THE BOARD PROCEED BY WAY OF WRITTEN HEARING?**

5. In DWPI's view, the issues relevant to the proceeding can continue to be thoroughly and adequately considered through a written proceeding. Board staff has not taken issue with the matter proceeding by way of a written hearing and only one of the seven intervenors, CORE, has filed submissions in support of the view that the Board should proceed with an oral hearing. The submissions of CORE, which are addressed in Part C, below, do not raise any good reason for the Board to deviate from its intended approach of proceeding by way of a written hearing. It is therefore DWPI's submission that the matter should continue to proceed by way of a written hearing.
6. In EB-2011-0394, the Board considered an application by McLean's Mountain Wind LP for leave to construct transmission facilities to connect wind generation facilities, for which the applicant had a Feed-in Tariff Contract, to the IESO-controlled grid. As in the present proceeding, following the interrogatory phase the Board invited parties to make submissions on whether the Board should proceed by way of a written or oral hearing. One party, the Manitoulin Coalition for Safe Energy Alternatives ("MCSEA"), argued in favour of an oral hearing. The Board's findings in respect of the appropriate form of hearing were as follows:

MCSEA's arguments in support of an oral hearing can be grouped into four general categories: deficiencies in the public notice, deficiencies in the application, incomplete or inaccurate information respecting the nature of the applicant's partnership structure, and incomplete or inaccurate information respecting the specifics of the proposed route.

*The Board is of the view that none of these reasons justify an oral hearing. The Board will conduct an oral hearing where it is determined to be the appropriate means of acquiring additional factual evidence which is required to reach a decision, or as a means of allowing parties to cross-examine on the written*

*evidence.* The Board has concluded that *given the scope of the proceeding* and the matters on which MCSEA proposes to cross-examine, an oral hearing on McLean's evidence would be of insufficient probative value to warrant its conduct.' (emphasis added)

7. Based on the test applied by the Board for determining whether an oral hearing was required in EB-2011-0394, the key considerations for the Board will be (a) the scope of the proceeding, (b) whether the Board requires additional facts in order to make a decision, (c) whether an oral hearing is the appropriate means of acquiring the additional factual evidence, and (d) whether an oral hearing is the appropriate means of allowing parties to cross-examine on the written evidence.
8. Regarding the scope of the proceeding, Section 96(1) of the *Ontario Energy Board Act* (the "Act") provides that, when considering an application under section 92, if the Board is of the opinion that the construction of the proposed work is in the public interest, it shall make an order granting leave to carry out the work. Pursuant to subsection 96(2), in an application under section 92, the Board shall only consider the following when it considers whether the construction of the electricity transmission line or making of the interconnection is in the public interest: (a) the interests of consumers with respect to prices and the reliability and quality of electricity service, and (b) where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. As indicated in the Applicant's pre-filed evidence, the interests of consumers with respect to prices will not be affected by the proposed Transmission Project because the cost of the Transmission Project will be paid for entirely by the Applicant.<sup>2</sup>
9. In Procedural Order No. 2, the Board reminded parties in the present proceeding of the limited scope of the Board's review under Section 92. The Board stated that matters relating to environmental impacts, environmental approvals, construction activities, as well as health and aesthetic issues are not within the scope of the Board's jurisdiction. Rather, it noted, many of these issues are instead considered within the scope of the

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<sup>1</sup>McLean's Mountain Wind LP, Procedural Order No. 6, April 24, 2012 (EB-2011-0394).

<sup>2</sup>Exhibit B, Tab 1, Schedule 1, p. 6.

Ministry of the Environment's Renewable Energy Approval ("REA") process. The Board also indicated that any approval of the leave to construct application would ordinarily be conditional upon all necessary permits and authorizations being received, including an approved REA.<sup>3</sup>

10. In respect of matters that are within the scope of the Board's review in this proceeding, it is the Applicant's submission that the evidentiary record is sufficiently complete. The Board does not require additional facts in order to render its decision on the Application. As described in paragraph 3 of these reply submissions, the evidence filed in this proceeding - consisting of the amended pre-filed evidence, responses to information requests from Board counsel and the Board, as well as the Applicant's responses to over 140 interrogatory questions and requests - is comprehensive and in satisfaction of the Filing Requirements. Moreover, a review of recent electricity leave to construct proceedings at the Board, including in particular for transmission lines to connect renewable energy generation facilities to the IESO-controlled grid, indicates that DWPI's Application and its pre-filed evidence are comprehensive in scope and presented with an appropriate level of detail that is sufficient for the Board to reach a decision. The evidentiary record is, in the Applicant's view, at least as comprehensive as is found in such other recent electricity leave to construct proceedings of a similar nature that have come before the Board. In each of these recent leave to construct proceedings reviewed, the Board was able to render its decision after proceeding exclusively by way of written hearing.<sup>4</sup>
11. Even if there were additional factual evidence required by the Board to reach a decision, which DWPI does not believe to be the case, it is the Applicant's view that an oral hearing would not be the appropriate means of providing this evidence. Moreover, as to whether an oral hearing is an appropriate means of allowing parties to cross-examine on the written evidence, in the Applicant's view the interrogatory process has provided intervenors and Board staff with ample opportunity to ask questions on all relevant

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<sup>3</sup> Procedural Order No. 2, December 14, 2012, pp. 3-4.

See, for example: White River Hydro LP (EB-2011-0420), McLean's Mountain Wind LP (EB-2011-0394), South Kent Wind LP (EB-2011-0217), Grand Renewable Wind LP (EB-2011-0063), Summerhaven Wind LP (EB-2011-0027).

aspects of the Application. As noted, the Applicant received and responded to numerous interrogatories from multiple parties on all aspects of the Application and pre-filed evidence. DWPI also notes that no party has raised any concerns regarding the adequacy of the Applicant's interrogatory responses.

12. The issues raised by CORE, which are discussed in Part C, below, are generally not within the scope of the proceeding or consist of points of argument rather than factual inquiry. While it is open to CORE to raise such points in its submissions, the issues raised do not warrant an oral hearing.
13. In summary, the scope of the proceeding is expressly limited by statute and, having regard to the scope of the Board's jurisdiction in this matter, the evidentiary record is sufficient for the Board to reach a decision. Parties have had ample opportunity through the interrogatory process to test the evidence. An oral hearing would be of questionable probative value and, to the extent relevant to the scope of the proceeding, any remaining issues or concerns identified in the submissions of CORE are, in the Applicant's view, matters for argument rather than for further evidence.

### **C.RESPONSES TO SPECIFIC INTERVENOR SUBMISSIONS**

14. Although three intervenors initially expressed opposition in their intervenor request letters to the Board proceeding by way of written hearing, the Board decided that it would instead determine this issue following the interrogatory phase. Subsequent to the Applicant filing its interrogatory responses, and in response to Procedural Order No. 3, only CORE has filed submissions in support of the view that the Board should proceed by way of oral hearing.<sup>5</sup> CORE's submissions are considered below.

#### ***CORE***

15. To summarize, CORE submits that the Board should proceed by way of an oral hearing due to (a) uncertainty in whether the proposed transmission facilities will be constructed, (b) uncertainty in where the proposed transmission facilities will be constructed, and (c)

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<sup>5</sup> CORE, Submission on the Need for an Oral Hearing, February 21, 2013 (EB-2012-0365).

dispute concerning whether there is community support for the planned wind farm and the proposed transmission facilities. These arguments inform the list of issues that CORE indicates it would address through cross-examination.

16. Each of these aspects of CORE's submissions are addressed below. In DWPI' s submission, CORE's submissions do not establish a good reason for the Board to deviate from its intended approach of proceeding by way of a written hearing. Taken as a whole, CORE's submissions raise issues that, to the extent relevant to the scope of the proceeding, are points of argument rather than points of fact. While it is open to CORE to raise such issues in its submissions, these issues do not justify having an oral hearing.

***Uncertainty in Whether the Transmission Facilities Will be Constructed does Not Justify an Oral Hearing***

17. One of the themes of CORE's submissions is that an oral hearing is justified by the level of uncertainty as to whether the proposed transmission facilities will actually be constructed. CORE argues that there is a high degree of uncertainty as to whether the proposed transmission facilities will be constructed. To support this view, CORE refers to the list of all *potentially applicable* permits, approvals and authorizations for each of the transmission facilities and the wind farm as set out in Table 1 of Exhibit E, Tab 2, Schedule 1. The Applicant provided the updated status and timelines for those permits, approvals and authorizations that it is actually required to obtain for the proposed transmission facilities in response to Board staff IR #2(i). This response indicates that the relevant approvals have either been received or are expected during 2013.
18. More significantly, there is no requirement and it is not common practice before the Board in applications of this nature for an applicant to have obtained all or substantially all of its regulatory permits and approvals prior to applying for or being granted leave to construct transmission facilities.
19. The Board considered this issue in Hydro One's application for leave to construct transmission facilities between the Bruce Power Facility and the Milton Switching Station (EB-2007-0050). In that proceeding, two parties brought motions requesting a

stay or adjournment of the leave to construct application on account of the relevant environmental assessment process not having been completed. The parties argued that the leave to construct should await completion of the environmental assessment and, until then, it is deficient and premature. The Board found that both the leave to construct and the environmental assessment approval were required for the project to proceed, but that neither process is completely dependent upon the other. While there was potential for conflicting results, this potential exists no matter which process goes first. Therefore, the Board explained, the proponent and the agencies involved must manage the various applications in an appropriate manner. In particular, the Board's leave to construct orders are made conditional upon all necessary permits and authorizations being acquired, including the relevant environmental assessment. In this way, the Board ensures that it is not in contravention of the other approvals requirements but allows for the timely consideration of applications before it.<sup>6</sup>

20. With respect to recent practice before the Board in applications of a similar nature, DWPI notes that the applicant in each of the following electricity transmission leave to construct proceedings did not have all or substantially all of its regulatory permits upon applying for or receiving leave to construct from the Board:

- White River Hydro LP and Gitchi Animki Energy LP (EB-2011-0420);<sup>7</sup>
- McLean's Mountain Wind LP (EB-2011-0394);<sup>8</sup>
- Ontario Power Generation Inc. (EB-2010-0056);<sup>9</sup>
- Detour Gold Corporation (EB-2011-0115);<sup>10</sup>
- Grand Renewable Wind LP (EB-2011-0063);<sup>11</sup>

21. Whether or not DWPI has to date obtained any or all of the permits and approvals that it will require to construct the proposed transmission facilities is a matter that will be

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<sup>6</sup> Decision and Order on Motion, July 4, 2007 (EB-2007-0050)

<sup>7</sup> Applicant's Response to Interrogatories from Board Staff, IR #9 and Schedule D, March 20, 2012 (EB-2011-0420).

<sup>8</sup> Applicant's Responses to Interrogatories from Board Staff, IR #5, March 30, 2012 (EB-2011-0394).

<sup>9</sup> Applicant's Responses to Interrogatories from Board Staff, IR #18, September 9, 2011 (EB-2010-0056).

<sup>10</sup> Applicant's Responses to Interrogatories from Board Staff, IR #1, June 29, 2011 (EB-2011-0115).

<sup>11</sup> Applicant Responses to Interrogatories from Board Staff, IR #2, August 15, 2011 (EB-2011-0063).



addressed effectively by making the granting of leave to construct conditional in accordance with the Board's normal practice. In this way, the Board can provide for the timely consideration of the Application while ensuring that DWPI is not in contravention of relevant approvals requirements from other governmental authorities. In addition to the pre-filed evidence in Exhibit E, Tab 2, Schedule 1, the status of DWPI's permits and approvals and the granting of leave to construct conditional upon these being obtained are addressed in the Applicant's responses to Board staff interrogatories #2(i) and (ii) and #15. There is no additional relevant factual evidence required on the status of DWPI's other permits and approvals for the Board to reach a decision on the Application and any cross-examination on the issue would, in DWPI's submission, be of little or no value within the scope of the proceeding. CORE is nevertheless free to make arguments concerning these issues in its submissions, including with respect to the conditions of approval that, in its view, should or should not apply.

***Uncertainty in Where the Transmission Facilities Will be Constructed does Not Justify an Oral Hearing***

22. A similar theme in CORE's submissions is that an oral hearing is justified by the level of uncertainty as to where the proposed transmission facilities will actually be constructed. CORE argues that this uncertainty as to the location of the proposed transmission facilities arises from the status of DWPI's land acquisition efforts to date. It is not suggested by CORE that there is uncertainty in the proposed location of the transmission facilities based on factual deficiencies in the evidence filed by the Applicant. As a result, this issue is in the nature of argument and can be raised in submissions but does not provide an appropriate basis for requiring an oral hearing.
23. DWPI notes that it has secured necessary land rights from most of the affected landowners through negotiations. A notable exception is Dufferin County, from which the Applicant has requested an easement for the rail corridor and with whom the Applicant continues to work towards this objective. The fact that it has not yet secured all outstanding land rights does not imply, as CORE suggests, that there is uncertainty as to the location of the proposed transmission facilities. Rather, DWPI has filed detailed

descriptions and mapping to illustrate the proposed locations of the facilities.<sup>12</sup> DWPI expects that the granting of leave to construct will be conditional upon it obtaining all necessary easements and other land rights that are required for the proposed transmission facilities. As is typically the case, to the extent that DWPI requires material changes to the proposed locations of its transmission facilities, the expectation is that it would be required to seek further approval from the Board to do so.

24. There is no additional relevant factual evidence required on the status of DWPI's land rights acquisition efforts for the Board to reach a decision on the Application. The locations, mapping and forms of agreements that are included in the Application and pre-filed evidence have all been available for review and subject to examination through the interrogatory process. As such, in respect of issues related to the status of DWPI's land acquisition, an oral hearing would be of questionable value.

***Dispute Concerning Whether there is Community Support does Not Justify an Oral Hearing***

25. Another theme in CORE's submissions is that an oral hearing is warranted by the perceived level of community support or lack of support for the Dufferin Wind Farm and the proposed transmission facilities. The Applicant does not agree that this is a reason that justifies an oral hearing. DWPI has filed detailed information concerning its stakeholder consultation program and process.<sup>13</sup> In addition, the Applicant's response to CORE Interrogatory #5 specifically addressed questions related to community support.
26. To the extent that CORE's concerns related to "community support" relate to the adequacy of public consultations generally, we note that this is a matter that is within the scope of the REA process. In particular, Part IV of O. Reg. 359/09 under the *Environmental Protection Act* sets out specific requirements that a proponent must meet with respect to consultations. This will be a factor that the Ministry of the Environment may consider in determining whether or not to grant the REA. To this end, it is a

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<sup>12</sup> See Exhibit B, Tab 2, Schedules 3 and 4.

<sup>13</sup> See for example Exhibit G, Tab 1, Schedule 1 and Applicant Responses to Board Staff Interrogatory #15(iii), which refers to the complete REA application that includes a detailed consultation report, and CORE Interrogatory #12.

requirement that the REA application include detailed and extensive documentation on the consultation process carried out by the proponent. The adequacy of consultations is therefore a matter that is properly within the scope of the REA process rather than the leave to construct process. Intervenor concerns in this respect should be addressed in the appropriate forum.

27. Notably, CORE's submissions with respect to community support are stated as being in relation to both the planned wind farm and the proposed transmission facilities.<sup>14</sup> It is not clear as to whether any of CORE's concerns related to the issue of community support are applicable specifically to the proposed transmission facilities. It appears, instead, that CORE's interests in the Application generally, and its submissions with respect to the issue of community support in particular, are primarily directed at the planned wind generation facility, which is not within the scope of this proceeding. A review of the documents appended to CORE's submissions substantiates this view as these documents are largely related to the planned wind generation facilities and to concerns with wind generation generally.
28. Moreover, paragraph 4 of the CORE submissions indicates that CORE "is an incorporated residents' group in the Township of Mulmur who have an interest in the wind farm proposed by DWPI, and whose members can be impacted by it." As is clear from Figure 1 of Exhibit B, Tab 2, Schedule 4, no portion of the proposed transmission facilities actually enters into the Township of Mulmur or runs along the Township of Mulmur's boundaries with any adjacent townships. Rather, the proposed transmission facilities will run within the Township of Melancthon, the Town of Shelburne and the Township of Amaranth. Interestingly, no portion of the planned generation facility will be situated in the Township of Mulmur either, but there are eight turbine locations that will be situated adjacent to the Township of Mulmur's boundary with the Township of Melancthon.

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<sup>14</sup> CORE Submissions, February 21, 2013 (EB-2012-0365) at para 26. In addition, the documents provided in Appendix 1 to 4 of the CORE Submissions are largely related to the planned generation facility rather than the proposed transmission facilities.

29. To the extent that its submissions relate to the planned wind farm, these are outside the scope of the proceeding. If and to the extent that CORE's submissions on the issue of community support are related specifically to the proposed transmission facilities, while community acceptance of the transmission facilities is beneficial from a project development perspective, it is not a pre-requisite for obtaining leave to construct pursuant to Section 92 of the Act. As discussed above, the limitations of the public interest test that is to be applied by the Board are prescribed in Section 96(2) of the Act. Determinations of the extent to which there is general support in a community for a proposed undertaking is not within the scope of this test.

***Proposed Issues to be Addressed Through Cross-Examination do Not Justify an Oral Hearing***

30. With respect to the issues that CORE indicates it would address through cross-examination, it is DWPI's submission that given the scope of the proceeding, an oral hearing would be of questionable probative value and is therefore not warranted. Generally, the issues listed by CORE are either not relevant to the proceeding, the factual record is sufficiently complete, or there has already been sufficient opportunity for parties to test the evidence through written interrogatories. In particular,
- as the public interest test under Section 96(2) of the Act does not require the Board to determine the level of community support for a project, the Board does not require further evidence concerning community support for the transmission line or other facilities in order to reach its decision;<sup>15</sup>
  - as the proposed transmission facilities will be paid for entirely by DWPI and will not be used to serve any customers other than DWPI's generation facility, the interests of consumers with respect to prices and the reliability and quality of electricity service are not areas that justify the need for an oral hearing;<sup>16</sup>
  - the forms of land agreements for which approval is sought have already been subject to consideration through the interrogatory process and, moreover, the prices and costs to DWPI of entering into these agreements with various

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<sup>15</sup> See CORE Submissions, Para 32, item (a).

<sup>16</sup> See CORE Submissions, Para 32, items (b), (c), (d) and (e).

landowners, which CORE proposes to consider through an oral hearing, are not relevant to the proceeding;<sup>17</sup>

- issues related to DWPI's ability to reach commercial operation under its FIT Contract with the Ontario Power Authority and its intended course of action should it not achieve commercial operation by January 2014 are not relevant to the proceeding;<sup>18</sup> and
- in light of the Board's practice of making leave to construct conditional upon obtaining other approvals, issues related to the status of DWPI's efforts to obtain such other regulatory approvals do not require further evidence for the Board to reach its decision.<sup>19</sup>

#### **D. CONCLUSION**

31. For the foregoing reasons, DWPI respectfully submits that there is no good reason for the Board to deviate from its intended approach of proceeding by way of written hearing. An oral hearing on DWPI's evidence would be of insufficient probative value to warrant its conduct. The Applicant therefore requests that the Board order that the proceeding shall continue by way of written hearing and promptly establish dates for written submissions and reply submissions.

All of which is respectfully submitted this 25th day of February, 2013.

**DUFFERIN WIND POWER INC.**

By its counsel

Torys LLP



Jonathan Myers

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<sup>17</sup> See CORE Submissions, Para 32, item (c).

<sup>18</sup> See Core Submissions, Para 32, items (f) and (g).

<sup>19</sup> See Core Submissions, Para 32, item (h).